PAN GLOBAL EQUITIES SDN BHD & ANOR

v.

TAISHO COMPANY SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: P-02-762-2002]
11 JULY 2005

CIVIL PROCEDURE: *Appeal - Fact, findings of - Whether appellate interference warranted*

CIVIL PROCEDURE: *Trial - Witness - Failure to call witness - Whether plaintiff-respondent obliged to call such witness*

MONEYLENDERS: *Commercial transaction - Moneys lent to company by shareholder - Whether such loans a money-lending transaction*

The respondent, in the High Court, sued to recover moneys lent to the appellants during a time of financial crisis. The respondent was then a creditworthy shareholder of the appellants. It borrowed from its bankers to lend to the appellants. The moneys were lent to the appellants at an interest rate over and above the rate charged by the respondent's bankers. At first instance, the appellants defended the respondent's claim on three grounds. They alleged that: (i) the respondent failed to prove that moneys had in fact been advanced to the appellants; (ii) the respondent's claim was barred by limitation; and (iii) the loans were irrecoverable because the respondent was an unlicensed moneylender ('the money-lending defence'). The trial judge rejected all three defences and entered judgment for the respondent. The appellants appealed. In the Court of Appeal, the sole issue for consideration concerned the money-lending defence.

Held (dismissing the appeal with costs)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The rejection by the learned judge of the first two defences depended on the findings of fact made by him. There was abundant material to show that the loans were indeed made and that there was no factual basis for the defence of limitation to succeed. Although the appellants raised complaints relating to the respondent's failure to call a certain witness, it

is not the law that a party who carries the burden of proving his or her case must call a certain number of witnesses. *Lee Ing Chin v. Gan Yook Chin* [2003] 2 CLJ 19 (refd). (p 737 d-g)

[2] In the instant case, the relationship between the respondent and appellants was one of a shareholder and his company. It was in its capacity as shareholder that the respondent advanced moneys to the respondent. On the facts, this was therefore not a case of the respondent carrying on the business of money lending. (p 738 c-e)

[3] The Moneylenders Act 1951, is designed to protect individuals who because of their impoverishment are caught in the jaws of unlicensed lenders. It is not designed to apply to facts such as in the present case. The loans made in the present case were thus not caught by the Moneylenders Act 1951. *Chellappah v. Official Assignee* [1971] 1 MLJ 24 (distd). (p 739 c-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Di Mahkamah Tinggi, responden mendakwa untuk mendapat kembali wang yang dipinjamkan kepada perayu semasa krisis kewangan melanda. Responden pada waktu itu adalah seorang pemegang saham perayu dan mempunyai kedudukan kewangan yang kukuh. Wang dipinjamkan kepada perayu pada satu kadar faedah yang lebih tinggi dan melebihi kadar yang dikenakan oleh pemiutang responden. Di mahkamah di bawah, perayu menentang tuntutan responden atas tiga alasan. Mereka mengatakan: (i) responden gagal membuktikan wang tersebut telah sebenarnya dipinjamkan kepada perayu; (ii) tuntutan responden telah dihalang oleh hadmasa; dan (iii) pinjaman tidak boleh didapat kembali kerana responden adalah seorang peminjamwang tak berlesen ('pembelaan pinjaman wang'). Hakim bicara menolak ketiga-tiga pembelaan sekaligus merekodkan penghakiman untuk responden. Perayu merayu dan di Mahkamah Rayuan persoalan tunggal yang berbangkit adalah menyentuhi pembelaan pinjaman wang.

Diputuskan (menolak rayuan dengan kos)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Penolakan dua pembelaan pertama oleh hakim bicara adalah berdasarkan dapatan-dapatan fakta yang dibuat oleh beliau. Terdapat limpahan bukti yang menunjukkan bahawa pinjaman memang telah diberi dan pembelaan had masa adalah tidak mempunyai asas fakta untuk berjaya. Walaupun perayu membangkitkan bantahan berkaitan kegagalan responden memanggil

seorang saksi tertentu, ianya bukanlah undang-undang bahawa pihak yang memikul beban untuk membuktikan kesnya wajib memanggil sejumlah tertentu saksi-saksi. *Lee Ing Chin v. Gan Yook Chin* [2003] 2 CLJ 19 (dirujuk).

[2] Dalam kes semasa, hubungan antara responden dan perayu adalah hubungan antara seorang pemegang saham dan syarikatnya. Pinjaman wang diberi oleh responden adalah atas kapasitinya sebagai pemegang saham. Berdasarkan fakta, ini bukanlah kes di mana responden menjalankan perniagan peminjaman wang.

[3] Akta Pemberipinjam Wang 1951 adalah digubal bagi melindungi individu-individu yang, disebabkan oleh kedaifan mereka, telah diperangkap oleh cengkaman peminjam-peminjam tak berlesen. Ia bukan dimaksudkan untuk dipakai kepada keadaan seperti kes semasa. Jelasnya, pinjaman yang dibuat dalam kes semasa adalah tidak termasuk dalam ruang litup Akta Pemberipinjam Wang 1951. *Chellappah v. Official Assignee* [1971] 1 MLJ 24 (dibezakan).

Case(s) referred to:
Chellapah v. Official Assignee [1971] 1 MLJ 24 ***(dist)***
Chow Yoong Hong v. Choong Fah Rubber Manufactory [1962] MLJ 74 ***(refd)***
Lee Ing Chin v. Gan Yook Chin [2003] 2 CLJ 19 CA ***(refd)***

Legislation referred to:
Moneylenders Act 1951, s. 3

For the appellant - Ghazi Ishak (B Jeyasingam with him); M/s Ghazi & Lim
For the 2nd appellant - Karin Lim (Lim Hock Siang with her); M/s Presgrave & Matthews
For the respondent - Mahinder Singh Dulku (Wong Yee Chue with him); M/s Lim Kean Siew & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-1-141-91]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram JCA:
The case for the respondent (plaintiff in the court below) against the appellants (defendants in the court below) was for the recovery of the sum of RM3,688,370.90 lent by the former to the first appellant and a further sum of RM 1,822,276.44 lent to the second appellant over the period 1976 to 1982. That case when expanded amounts to this.

During this period, the respondent was a shareholder of the appellants. The appellants were then financially straitened. Urgent cash was required from time to time to keep the appellants afloat. The appellants' creditworthiness was in grave doubt. The respondent was creditworthy and furnished the cash by borrowing funds from its bankers. It charged the appellants interest on the monies advanced. Later, the shareholding of the appellants changed hands. The new shareholders put their board in place and the new board took the position that the appellants were not indebted to the respondent. At the trial the appellants went forward on three defences. First, that the respondent had failed to prove that any monies had indeed been advanced to the appellants. Second, that the respondent's claim was barred by limitation. Third, that the loans were irrecoverable because the respondent was an unlicensed moneylender. The trial judge rejected all three defences and entered judgment for the respondent. The appellants want that judgment reversed.

Having very carefully read the record of appeal and having re-read it for the purpose of writing this reserved judgment I am entirely satisfied that the only issue with any need for consideration is the moneylending defence. The rejection by the learned judge of the first two defences depends on the findings of fact made by him. There is abundant material to show that the loans were indeed made and that there was absent a factual basis for the defence of limitation to succeed. Complaint was made by learned counsel for each of the appellants that the trial judge was wrong in not drawing an adverse inference against the respondent for failing to call one Saw Eng Lock who was the managing director of each of the appellants at the material time, that is to say when the loans were made. He was the respondent's representative on the appellants' boards. But the respondent did call one Saw Cheow Lip (PW3) who was in charge of the appellants' financial matters during the relevant period. This witness whose credibility appears to have been confirmed by contemporary documentary evidence was rightly accepted by the trial judge and no criticism may fairly be made of this. Since the respondent who had accepted the risk of persuasion had succeeded in convincing the judge of the truthfulness of PW3, nothing turns on the failure to call Saw Eng Lock. It is not the law that a certain number of witnesses must be called by a party who carries the burden of proving his or her case. Quite the contrary. And we made that clear in *Lee Ing Chin v. Gan Yook Chin* [2003] 2 CLJ 19.

I now turn to the moneylending defence. There is no doubt that in respect of all the monies advanced to the appellants the respondent charged interest over and above the rate it had to pay its bankers. The learned trial judge nevertheless rejected this defence on the ground that the respondent did not carry on the business of moneylending. The judge relied on the judgment of Lord Devlin in the celebrated case of *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] MLJ 74 where the learned Law Lord said:

> To lend money is not the same thing as to carry on the business of money-lending. In order to prove that a man is a money-lender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his money-lending transactions.

Learned counsel for the second appellant says that the learned judge was wrong in taking the approach he did because the respondent's memorandum of association sets out one of its objects as that of moneylending. With respect we think that counsel has addressed the wrong target. The real issue before the learned judge was the true nature of the relationship between the respondent and the appellants at the material time. And that relationship was one of a shareholder and his company. It was in its capacity as shareholder that the respondent advanced monies to the respondent. This is therefore not a case of the respondent carrying on the business of money lending on the facts. It is commonplace in the corporate environment for shareholders or directors of a company to advance it funds at interest to tide it over difficult periods of financial hardship. Such transactions are necessary for keeping companies in a position to meet their debts as and when they fall due. If the courts proceed to treat these transactions as pure money lending within the Moneylenders Act 1951, then no shareholder or director will ever be able to recover genuine advances albeit bearing interest made to his or her company during a time of want. Business in the corporate sector as we know it will come to a literal standstill and companies instead of looking to survival will face extinction.

Now, I am entirely conscious of the line of cases where judges of great distinction have pronounced upon the interpretation to be given to s. 3 of the 1951 Act. It suffices if I mention *Chellappah v. Official Assignee* [1971] 1 MLJ 24, where Suffian FJ said:

> The question here is, was the appellant a moneylender within the meaning of the Ordinance? If he was, then the decision of the official assignee was right. The Privy Council has pronounced on the effect of the presumption under section 3 (which does not exist in the equivalent English legislation) in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] MLJ 74 PC. Delivering the advice of their Lordships, Lord Devlin said at page 77:
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> > The effect of [section 3] has been considered by Thomson J (as he then was) in *Sadhu Singh v. Sellathurai* [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of money lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his money lending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in

> a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence that there were sufficient other transactions of a similar sort to amount to a carrying on of business.
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> It will be seen that proof of a **single** loan made to the debtor at interest raised a presumption that there were sufficient other transactions of a similar sort to amount to a carrying on of the business of money lending by the appellant. (Suffian FJ's emphasis).

The facts of the cases decided under s. 3 of the 1951 Act are far different from the present. In my judgment, the 1951 Act, by its spirit and intendment is designed to protect individuals who because of their impoverishment are caught in the jaws of unlicensed lenders. It was certainly not designed to apply to fact patterns such as those that exist in the present instance. I would therefore respectfully agree, albeit for slightly different reasons, with the learned judge on his finding that the loans made in the present case are not caught by the 1951 Act.

There is no merit whatsoever in this appeal. I would accordingly dismiss it, affirm the orders of the court below and award the costs of this appeal to the respondent. The deposit shall be paid out to the respondent to account of its taxed costs.

My learned brothers Richard Malanjum and Hashim bin Dato' Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.